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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 252

[DFARS Case 2012-D006]

RIN 0750-AH57

Defense Federal Acquisition Regulation Supplement: Alleged Crimes By or Against Contractor Personnel

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009 and expand coverage on contractor requirements and responsibilities relating to alleged crimes by or against contractor personnel.

DATES: Effective [Insert date of publication in the **FEDERAL REGISTER**.]

FOR FURTHER INFORMATION CONTACT: Ms. Meredith Murphy, telephone 571-372-6098.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the Federal Register at 77 FR 14490 on March 12, 2012, to revise paragraph (d) of the clause at DFARS 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, to require contractors to provide information to their employees on how and where to report alleged crimes and where to seek assistance or whistleblower protection. These requirements apply to all DoD contracts that authorize contractor personnel to accompany U.S. Armed Forces deployed outside the United States in contingency operations, humanitarian or peacekeeping operations, or other military operations when the latter are designated by the combatant commander. Section 854 of the NDAA for FY 2009 (Pub. L. 110-417) applied this requirement just to contracts performed in Iraq and Afghanistan. Four respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis of the Public Comments

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of changes from the proposed rule

The Defense Criminal Investigative Service was added to the list at paragraph (d)(6) of the clause, and the title for the U.S. Army Criminal Investigation Command was corrected. In

addition, the explanation of the impact of the changes was clarified in Section I, Background, of this notice.

B. Analysis of public comments

1. Add the Defense Criminal Investigative Service to the list of appropriate investigative agencies

Comment: One respondent requested the addition of the Defense Criminal Investigative Service (DCIS) to the list of appropriate criminal investigative agencies to which suspected crimes should be reported. DCIS is the criminal investigative arm of the DoD Office of the Inspector General, and it also investigates alleged crimes involving contractor personnel.

Response: The requested change has been made.

2. Update the information on the U.S. Army Criminal Investigation Command

Comment: One respondent stated that the U.S. Army's criminal investigative unit was established as a major command on September 17, 1971, and renamed the "U.S. Army Criminal Investigation Command."

Response: The requested change has been made.

3. Clarify the impact of the change on applicability of these requirements

Comment: A respondent stated that the explanation of the proposed change and its impact in the proposed rule (77 FR 14490) were not clear and implied that the applicability of the

clause at DFARS 252.225-7040 was proposed for revision, without, however, actually amending the clause prescription.

Response: The "Background" section of the proposed rule could have been interpreted more than one way. However, the preamble to this final rule makes clear that there is no change to the applicability of DFARS clause 252.225-7040.

4. Consider imposing a range of penalties in the event of noncompliance

Comment: A respondent expressed support for "these relatively modest requirements on contractors." In addition, the respondent suggested that, to strengthen accountability, DoD should consider imposing a range of penalties in the event of noncompliance, "much like non-compliance with the trafficking in persons provision in the Federal Acquisition Regulation (FAR) subjects contractors to the following remedies:

- 1) Requiring the contractor to remove a contractor employee or employees from the performance of the contract;
- 2) Requiring the contractor to terminate a subcontract;
- 3) Suspension of contract payments;
- 4) Loss of award fee, consistent with the award fee plan, for the performance period in which the government determined contractor non-compliance;
- 5) Termination of the contract for default or cause, in accordance with the termination clause of this contract; or

6) Suspension or debarment."

The respondent cited FAR 52.222-50(e) as the source for the above list.

Response: Most or all of the remedies that are cited by the respondent are already available to the Government in the event of noncompliance by a contractor with the requirements of a clause that is included in its contract. It is not necessary to cite them in each individual contract clause to which they may be applied.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Information and Regulatory Affairs has determined that this is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., and is summarized as follows:

DoD is expanding coverage on contractor requirements and responsibilities relating to alleged crimes by or against contractor personnel. These requirements will be included in any contract that authorizes contractor personnel to accompany U.S. Armed Forces deployed outside the United States in (1) contingency operations; (2) humanitarian or peacekeeping operations; or (3) other military operations or military exercises, when designated by the combatant commander. DoD is accomplishing this change by modifying the clause at DFARS 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States.

The two key requirements are for the contractor to (a) report any alleged offenses against the Uniform Code of Military Justice and the Military Extraterritorial Jurisdiction Act to appropriate investigative authorities and (b) give contractor personnel who work in covered areas information on how and where to report an alleged Uniform Code of Military Justice or Military Extraterritorial Jurisdiction Act offense. The clause also provides contact information for the four criminal investigative agencies in the DoD.

No significant issues were raised in the public comments received in response to the proposed rule. No comments were filed by the Chief Counsel for Advocacy of the Small Business Administration.

The rule will apply equally to all contractors, large and small, performing in deployed areas. Approximately 184 small businesses may be impacted by these changes annually. However, there are no projected reporting, recordkeeping, or other compliance requirements associated with the proposed rule. The points of contact for reporting alleged crimes and/or seeking whistleblower protection are listed in the clause. Contractor compliance requirements have been limited to passing this clear, available information to their personnel. Because the burdens associated with these requirements have already been minimized, there are no significant alternatives that could further minimize the already minimal impact on businesses, small or large.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR part 252

Government procurement.

Manuel Quinones

Editor, Defense Acquisition Regulations System.

Therefore, DoD amends 48 CFR part 252 as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for part 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Section 252.225-7040 is amended by—

a. Removing the clause date "(JUN 2011)" and adding "(FEB 2013)" in its place;

b. Revising paragraph (d)(3)(ii); and

c. Adding paragraphs (d)(4) through (7).

The revision and addition read as follows:

252.225-7040 Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States.

* * * * *

(d) * * *

(3) * * *

(ii) That many of the offenses addressed by the definition are covered under the Uniform Code of Military Justice (see paragraph (e)(2)(iv) of this clause). Other sexual

misconduct may constitute offenses under the Uniform Code of Military Justice, Federal law, such as the Military Extraterritorial Jurisdiction Act, or host nation laws;

(4) The Contractor shall report to the appropriate investigative authorities, identified in paragraph (d)(6) of this clause, any alleged offenses under—

(i) The Uniform Code of Military Justice (chapter 47 of title 10, United States Code) (applicable to contractors serving with or accompanying an armed force in the field during a declared war or contingency operations); or

(ii) The Military Extraterritorial Jurisdiction Act (chapter 212 of title 18, United States Code).

(5) The Contractor shall provide to all contractor personnel who will perform work on a contract in the deployed area, before beginning such work, information on the following:

(i) How and where to report an alleged crime described in paragraph (d)(4) of this clause.

(ii) Where to seek victim and witness protection and assistance available to contractor personnel in connection with an alleged offense described in paragraph (d)(4) of this clause.

(6) The appropriate investigative authorities to which suspected crimes shall be reported include the following—

(i) US Army Criminal Investigation Command at <http://www.cid.army.mil/reportacrime.html>;

(ii) Air Force Office of Special Investigations at
<http://www.osi.andrews.af.mil/library/factsheets/factsheet.asp?id=14522>;

(iii) Navy Criminal Investigative Service at
<http://www.ncis.navy.mil/Pages/publicdefault.aspx>;

(iv) Defense Criminal Investigative Service at
<http://www.dodig.mil/HOTLINE/index.html>;

(v) To any command of any supported military element or
the command of any base.

(7) Personnel seeking whistleblower protection from
reprisals for reporting criminal acts shall seek guidance
through the DoD Inspector General hotline at 800-424-9098 or
www.dodig.mil/HOTLINE/index.html. Personnel seeking other forms
of victim or witness protections should contact the nearest
military law enforcement office.

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